Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DONALD J. WILLY AND J. SUSAN WILLY,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,
STATE CORPORATION COMMISSION,

Respondent.

On Petition for Writ Of Certiorari to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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I. Questions Presented.

1. Did Virginia fail to accord full faith and credit by relying exclusively on Virginia law to interpret a Texas jury verdict instead of according the same effect as Texas law would give to the final judgment in assessing res judicata?

2. Is the Virginia State Corporation Commission permitted to require that full faith and credit abate pending lawsuits in other states, compel all claims be submitted to its administrative adjudication, and then refuse to hear claims arising under the laws of any state other then Virginia?

3. Is the Virginia State Corporation Commission's final adjudication of private claims independent of any court, without de-novo review, or an independent, unbiased adjudicator who issues decisions based on the evidence at hearing, a violation of due process under the United States Constitution, Fourteenth Amendment?

II. List of Parties.

Donald J. Willy, Petitioner

Susan Willy, Petitioner

State Corporation Commission of the Commonwealth of Virginia, Respondent.

Alfred W. Gross, Insurance Commissioner of the Commonwealth of Virginia, Deputy Receiver (Real Party in Interest).

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Petitioners Donald J. Willy, a member of the Bar of this Court, and his wife, J. Susan Willy, respectfully pray that this Court grant a Writ of Certiorari to review the judgment and opinion of the Supreme Court of the Commonwealth of Virginia issued March 26, 2004.

V. Reports of Orders and Opinions Below.

The Hearing Examiner's Recommended Decision and Corporation Commission's Order are not published. The Opinion of the Supreme Court of Virginia is not yet published. All are reproduced in the Appendix

VI. Basis for Jurisdiction.

This is an appeal from a final decision of the Supreme Court of Virginia dated March 26, 2004. The Court has jurisdiction pursuant to United States Code, Title 28, §1257(a).

VII. Constitution Provisions and Statutes.

United States Constitution, ARTICLE IV, Section 1.

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

United States Constitution, ARTICLE IV, Section 2.

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

United States Constitution, FOURTEENTH AMENDMENT, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Excerpt from Constitution of Virginia, Article IX, Corporations:

Section 1. State Corporation Commission.

> There shall be a permanent commission which shall be known as the state Corporation Commission and which shall consist of three members. The General Assembly may, by majority vote of the members elected to each house, increase the size of the Commission to no more than five members. Members of the Commission shall be elected by the General Assembly and shall serve for regular terms of six years. At least one member of the Commission shall have the qualifications prescribed for judges of courts of record, and any Commissioner may be impeached or removed in the manner provided for the impeachment or removal of judges of courts of record. ... The Commission shall annually elect one of its members chairman. Its subordinates and employees, and the manner of their appointment and removal, shall be as

provided by law, except that its heads of divisions and assistant heads of divisions shall be appointed and subject to removal by the Commission.

Section 2. Powers and duties of the Commission.

... The Commission shall in proceedings before it ensure that the interests of the consumers of the Commonwealth are represented, unless the General Assembly otherwise provides for representation of such interests. The Commission shall have such other powers and duties not inconsistent with this Constitution as may be prescribed by law.

Section 3. Procedures of the Commission.

Before promulgating any general order, rule, or regulation, the Commission shall give reasonable notice of its contents. In all matters within the jurisdiction of the Commission, it shall have the powers of a court of record to administer oaths, to compel the attendance of witnesses and the production of documents, to punish for contempt, and to enforce compliance with its lawful orders or requirements by adjudging and enforcing by its own appropriate process such fines or other penalties as may be prescribed or authorized by law. Before the Commission shall enter any finding, order, or judgment against a party it shall afford such party reasonable notice of the time and place at which he shall be afforded an opportunity to introduce evidence and be heard. The Commission may prescribe its own rules of practice and procedure not inconsistent with those made by the General Assembly. The

General Assembly shall have the power to adopt such rules, to amend, modify, or set aside the Commission's rules, or to substitute rules of its own.

Section 4. Appeals from actions of the Commission.

The Commonwealth, any party in interest, or any party aggrieved by any final finding, order, or judgment of the Commission shall have, of right, an appeal to the Supreme Court. The method of taking and prosecuting an appeal from any action of the Commission shall be prescribed by law or by the rules of the Supreme Court. All appeals from the Commission shall be to the Supreme Court only. No other court of the Commonwealth shall have jurisdiction to review, reverse, correct, or annul any action of the Commission or to enjoin or restrain it in the performance of its official duties, provided, however, that the writs of mandamus and prohibition shall lie from the Supreme Court to the Commission.

Excerpt from Virginia Code, Title 38.2, Chapter 15, §1508, <u>Powers of Commission when authorized to rehabilitate or liquidate companies</u>.

The Commission may deal with the property and affairs of the insurer in its own name or in the name of the insurer. The Commission shall be vested by law with the title to all of the property, contracts and rights of action of the insurer as of the date shown by the order of the court referred to in §38.2-1507.

VIII. Statement of the Case.

Virginia's constitution creates an autonomous fourth branch of government – the State Corporation Commission. In effect the Commission is an administrative agency existing independently and without control of Virginia's executive or judicial branches.

This appeal complains of the Commission's policy and procedures when it functions as "receiver" of insolvent insurance companies. As receiver the Commission declaims a policy establishing it as the focus of a single regulatory scheme for the resolution of claims against insolvent insurers. This policy overrides all other considerations. The Commission *(i.)* takes on the legal status of the insolvent company – administering the res, and *(ii.)* simultaneously defends private claims - through its at-will employee Commissioner of Insurance who serves as Deputy Receiver, and *(iii.)* acts as fact-finder and adjudicator for liquidation of those claims – through its at-will employee Hearing Examiner. This violates procedural due process.

The Commission asserts full faith and credit of Virginia receivership orders to abate all other litigation in every state. Claimants are thus forced to Virginia. But when they file a claim, the Commission refuses to recognize any basis other than Virginia law - precluding claims under any other state's law. This breaches Article IV.

The Commission is exempt from Virginia's statute regulating hearing examiners' independence, Virginia's freedom of information act, and procedural and substantive requirements imposed on Virginia's courts. The Commission affords no jury or other independent trier of fact and its at-will employee hearing examiners determine questions of law. It is exempt from supervision of the court creating a receivership. Although permitted by the receivership order, it refuses to defend claims in other forums. Virginia provides no de-novo judicial review. Appeal is to Virginia's Supreme

Court which reviews presuming the Commission's rulings "to be just, reasonable, and correct."[1]

The Willy's, residents of Texas, purchased a home from a Texas builder, who as permitted under Texas law, demurred express and implied warranties of merchantability and workmanship in consideration of providing a warranty insurance policy. Under Texas law if a builder replaces warranties with an insurance policy, homeowners are required to proceed against the insurance company on claims. The builder has no liability.[2]

The insurance provider (Home Owner's Warranty Company "HOW") was organized as a risk retention group under the Liability Risk Retention Act, 15 U.S.C. §3901 *et. Seq.* It maintained operational headquarters in Texas, but was domiciled in Virginia. Under the policy HOW was obligated to correct major structural defects irrespective of any fault and to correct builder warranty defects if the builder failed to do so. When the builder refused to correct alleged defects, the Willy's sued the builder for warranty breach, fraud, and deceptive trade practices, and sued HOW for failing to correct builder warranty defects, fraud and deceptive trade practices. The builder and insurance company answered and did not object to Texas jurisdiction.

HOW became insolvent and was placed into a Virginia state receivership by an agreed order between the company and Commission entered in the Circuit Court of the

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[1] Swiss Re Life Co. Am. v. Gross, 253 Va. 139, 144; 479 S.E.2d 857, 860 (1997).

[2] Buecher, et al v. Centex Real Estate Corporation, 18 SW.3d 807 (Tex App. 4th, 2000) affd. Centex Homes, et al. v. Buecher, et al, 45 Tex. Sup. J. 1216, rehearing affd. 95 SW.3d. 266 (Tex, 2002). G-W-L, Inc. v. Robichaux, 643 SW.2d. 392 (Tex, 1982) Cate v. Dover Corporation, 776 SW.2d. 680 (Tex., 1989).

City of Richmond, Virginia. The Willy's were not parties. The Commission was designated as Receiver, and its employee, Virginia's Commissioner of Insurance as Deputy Receiver. The receivership order enjoined suits against HOW. Asserting full faith and credit, the Deputy Receiver abated the Willy's pending Texas lawsuit against HOW and the Texas court severed these claims. The Willy's proceeded to jury trial in 1997 against the builder, and lost. No judgment was entered concerning HOW, nor was it or the receiver a party after abatement.

In 1999, when the Willy's learned that the receivership began paying claims, they filed a claim and HOW refused to pay. The Willy's appealed to the Deputy Receiver. He refused to pay. The Willy's appealed to the Corporation Commission. Its hearing examiner, without conducting an evidentiary hearing or reviewing the record of the jury trial, even though the Willy's contended there were contested issues of fact,[3] ruled (*i.*) that the Willy's were bound by a prior Texas jury verdict in favor of their builder, and they could not recover against the insurance company without the builder being held liable (Appendix, page 19); and (*ii.*) and that the insurance company was not responsible for fraud or Texas Deceptive Trade Practices statutory claims as these were not made under Virginia law. (Appendix, page 24-25)

The Willy's objected to the hearing examiner's recommendations because res judicata does not apply when parties are not identical, and in any event, because he did not review the record – relying entirely on the verdict which

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[3] Virginia Supreme Court Rule 316 requires that "summary judgment shall not be entered if any material fact is genuinely in dispute", and "a court in considering such a motion must adopt those inferences from the facts that are most favorable to the nonmoving party, unless the inferences are strained, forced, or contrary to reason" Carson ex rel. Meredith v. LeBlanc, 245 Va. 135, 139-140; 427 S.E.2d.189 (1993).

addressed a different cause of action, and because their fraud and Texas deceptive trade practice claims were not heard by any forum. They again requested a hearing. Without a hearing, the Commission dismissed the Willy's claim stating "Upon consideration of the filings submitted, the Report of Hearings Examiner, and the Comments thereto, the Commission is of the opinion that the findings and recommendations of the Hearing Examiner should be adopted". (Appendix, Page 10)

The Willy's appealed to Virginia's Supreme Court. After oral argument, in a three page opinion issued March 26, 2004, that court ruled "there is no error in the order appealed from," and that the Commission's procedures and the underlying statute are constitutional, and Willy's arguments "without merit". (Appendix, Page 3)

IX. Argument

This petition requests that the Court grant certiorari to consider reversing the Virginia Supreme Court and condemn violations of Article IV and the Fourteenth Amendment by an independent department of Virginia's government. The Commission conducts administrative adjudication of private claims[4] in a multistate context. The

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[4] Adjudication of private issues traditionally is an arena for courts. Other entities may serve as adjuncts, for example when authority is delegated to a receiver, but a court traditionally maintains control. When an administrative agency is designated receiver by some mechanism other than a court, adjudications become driven by policy – creating a conflict between rule of law and bureaucratic efficiency. By entrusting private claims determinations to an agency, and not insuring an independent judicial process, due process suffers.

This Court has not been recently instructive concerning state administrative adjudication of private matters, and its nineteenth and twentieth century considerations do little to explain concerns about today's multi-state litigation. In review of essentially public matters, because states were not constrained by Article III, they were free to experiment. Due process did not prohibit a State from conferring judicial

crux is that in Virginia, an administrative agency acting as receiver has displaced - rather than serving as an adjunct to the judiciary – for determination of private claims.

Even though a state may allocate resources as it sees fit, it must do so in a way not abrogating its Constitutional obligations. Virginia's system has dire consequences for a minimum standard of due process. Virginia has not equipped its fourth branch with the tools of due process – it permits the agency to consign "policy" above "rule of law", and ignore fundamentals of adjudication independence. The adjudicator is not independent. No evidentiary hearing was conducted. No transcript was prepared - the hearings were unrecorded. Virginia's lower courts are forbidden to interfere and appellate review does not insure Virginia's full faith, privileges and immunities or due process obligations. Virginia's Supreme Court conducted a "just, reasonable and

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functions upon non-judicial bodies such as parole boards', or giving licensing boards' discretionary power to grant or withhold permission to carry on a trade. Ballard v. Hunter, 204 U.S. 241, 255 (1907); Palmer v. McMahon, 133 U.S. 660, 668 (1890); McMillen v. Anderson, 95 U.S. 37, 41 (1877); Railroad Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940); Carfer v. Caldwell, 200 U.S. 293, 297 (1906).

Permitting states to do whatever they find efficient, even in the public arena does not work as evidenced by Goldberg. In the federal context Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), required ascertaining whether agencies were ``adjuncts" of Article III courts, that is, whether courts were sufficiently in charge to protect constitutional values. Granfinancera, SA v. Nordberg, 492 U.S. 33 (1989) ruled Congress lacks the power to strip parties who are contesting matters of "private right" of their constitutional right to a jury trial even if the proceeding is characterized as a core proceeding in bankruptcy. On the Fourteenth Amendment side, this court has never recently considered state agency adjudication of private rights. An adjunct question in this case is whether a state agency adjudicating private claims, without resources traditionally employed to insure fair adjudication, and without being bound by rule of law, and having a policy that places efficiency over law, accorded due process without supervision of a court.

correct" review, considering due process and state's relations claims advanced on appeal to be "without merit".

In an Article IV context, how a state conducts its internal business is constitutionally irrelevant - provided it guarantees basic rights, and conducts relations with other states in accord with Article IV. Virginia flouts these precincts. Because it acts for Virginia, the Commission asserts Constitutional prerequisites that states possess under Article IV, but it does not coordinately convey rights, liberties, immunities and processes to which other states' citizens are entitled when forced to present private claims in Virginia having a multi-state import. The Commission asserted full faith and credit for its HOW receivership orders. After forcing everyone to Virginia, it failed to give credibility to foreign laws which were the basis of their claims.

Although this case involves an administrative agency acting as receiver of an insolvent insurance company, and insurance is a regulatory sphere traditionally left to the states, the issue on appeal involves adjudication of private claims – contracts, torts, and statutory deceptive trade practices - not regulation of an insurance company.

The United States Supreme Court should issue a writ of certiorari to review Virginia's dogged policy that its fourth branch - exempt from typical due process requirements of judicial independence, accountability, and impartiality - and to the exclusion of all other qualified adjudicators of Virginia and every other state – is the only entity which may liquidate private claims against insolvent insurance companies while refusing to hear claims based on any other state's law. The Constitutionality of Virginia's system has never been considered by this Court, nor has

adjudication of private claims by administrative agencies been substantially discussed since Crowell v Benson.[5]

Incidence of state agencies adjudicating "private" claims is mushrooming, as agencies supplant courts in traditional judicial roles.[6] Administrative decisions increasingly have multi-state influence. Tolerating state administrative agencies' adjudication of private rights without adequate judicial control or ensuring the agency provides minimal due process adjudication adversely affects the Constitution's integral reciprocity and devastates states' relations, comity, and uniform standards of due process.

Full Faith and Credit - Res Judicata.

The United States Constitution creates intertwining obligations between states to recognize each other's final acts. States must give the same effect to a judgment as does the home state. Virginia ignored this maxim, when it arrogantly employed Virginia law to determine collateral effect of a Texas judgment. It was obligated to employ Texas law. This error is so elementary as to merit reversal. While vividly demonstrating the inadequacy of the Commission's adjudicating private claims without judicial supervision, as well as the impotency of Virginia's appellate review.

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[5] 285 U.S. 22; 52 S. Ct. 285; 76 L. Ed. 598 (1932).

[6] McInnis v. State, 618 S.W.2d. 389 (Tex CA – Beaumont, 1981, writ ref'd n.r.e.; cert denied 456 U.S. 976 (1982) (due process and criminal issues); Richardson v. Tennessee Board of Dentistry, 913 S.W.2d. 466 (Tenn., 1995) (Authority to decide constitutional issues); Schultz v. Springfield Forest Products, 141 Or. App. 727 (1997) (agency has power to review to determine compliance with statute or constitution); Nutbrown v. Munn, 311 Or. 328, 811 P.2d. 131, cert denied 502 U.S. 1030 (1992) (agency has power to declare statutes and rules unconstitutional).

In Texas a judgment releasing the builder does not release the insurance company where the company has an independent obligation to the homeowner. Buecher, et al v. Centex Real Estate Corporation, 18 SW.3d 807 (Tex App. 4th, 2000) affd. Centex Homes, et al. v. Buecher, et al, 45 Tex. Sup. J. 1216, rehearing 95 SW.3d. 266 (Tex, 2002). Texas would not bar the Willy's claims against HOW because they could not be pursued after the case was abated. Getty Oil Co. v. Insurance Co. of N. America, 845 SW.2d. 79 (Texas, 1992) – (where respondent insurer could not have been made a party to lawsuit, claims could be asserted against it in subsequent action); Price v. Texas Employer's Ins. Ass'n., 782 SW.2d. 939, 940 (Tex App – Tyler, 1989) – (determination of jury that party was not negligent did not bar subsequent determination of whether another party's liability was incident to performance). Res Judicata implies a party had an opportunity to litigate the same claim against the same party in a former action before a court of competent jurisdiction. Southern Pacific R.R. Co. v. U.S. 168 U.S. 1 (1897). In Texas neither HOW nor the receivership were parties after abatement to the Willy's suit.

Obviously the Willy's did not assert major structural defect claims against the builder in their 1992 Texas lawsuit, because those claims were unavailable until year three of the contract, and the suit was commenced in year two, and under the insurance contract and Texas law major structural defect claims were HOW's sole responsibility. Therefore, the Texas jury verdict upon which the hearing examiner relied had nothing to do with the Willy's major structural defect claim made in 1999 against the insurance carrier because that cause of action cannot even be asserted against the builder. HOW is responsible for major structural defects – the policy does not imply that the builder need be liable to claim this coverage.

Strangely, the Commission agrees with this analysis in its published interpretation of the HOW insurance policy in Report to Home Owners, Member Builders, Creditors and Other Interested Persons.[7] The Report states "the Member Builder gives no express warranty to the purchaser for such repairs. The warranty provides that the insurance, not the builder will pay for the cost to repair Major Structural Defect damage on behalf of the purchaser during years three through ten after the home's construction."

Despite this published interpretation, the hearing examiner recommended barring the Willy's claim, and the Commission without substantive review adopted this recommendation. The Virginia Supreme Court's approved, citing Angstadt v. Atl. Mut. Ins. Co., 249 Va. 444, 446-47, 457 S.E.2d. 86. 87 (1995), a Virginia case - simply accentuating the error. It doesn't matter what Virginia law does, Texas is entitled to full faith and credit for what it would have done.

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[7] HOW Insurance Company Report to Home Owners, Member Builders, Creditors and other Interested Persons, page 7, undated, obtainable at www. howcorp.com/ (emphasis added):

> "Under the second coverage of the HOWIC Warranty, the participating Member Builder receives insurance from HOWIC against any covered claims that a purchaser of a new home may make during years three through ten after the home's construction for the repair of "Major Structural Defects." ...
>
> Under the second coverage, the Member Builder gives no express warranty to the purchaser for such repairs. The HOWIC Warranty provides that HOWIC, not the Member Builder, will pay for the cost to repair Major Structural Defect damage on behalf of the purchaser during years three through ten after the home's construction. *(emphasis added)* HOWIC will pay for the cost to repair actual physical damage to the home resulting directly from the Major Structural Defect".

Virginia failed to accord full faith and credit by relying exclusively on Virginia law to interpret a Texas jury verdict instead of according the same effect as Texas law would give to the final judgment. Virginia violated the Willy's due process rights by ignoring Article IV, Section 1 and denying a forum to their claims.

Full Faith and Credit – Choice of Law

Full faith and credit is designed to transform the states from independent sovereigns into a unified Nation. A state, when acting as the forum for litigation having multi-state implications, must respect the legitimate interests of other states, but because the forum is also a sovereign, in appropriate cases it may attach paramount importance to its own interests.[8] Article IV and the comparable due process standards obligate a forum to hear foreign law claims, subject to its own interest in furthering its own public policy.

The Commission's policy is to "establish a single regulatory scheme for the comprehensive and efficient resolution of claims against an insolvent insurer ... [avoiding] conflicting rulings, piecemeal litigation of claims, and unequal treatment of policyholders". Virginia's constitution requires only the "Commission shall in proceedings before it ensure that the interests of the consumers of the Commonwealth *(emphasis added)* are represented",[9] - ignoring obligations under Article IV, Section 2 to non-residents. Implementing policy the Commission liquidates claims allowing only those based on

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[8] Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981); Nevada v. Hall, 440 U.S. 410 (1979); Carroll v. Lanza, 349 U.S. 408 (1955); Pacific Employers Ins. Co. v. Industrial Accident Comm., 306 U.S.493 (1939); Alaska Packers Assn. v. Industrial Accident Comm., 294 U.S. 532 (1935).

[9] Constitution of Virginia, Article IX, Section 2.

Virginia law. It refused to recognize the Willy's fraud and Texas deceptive trade practice claims.

"For a State's substantive law to be selected in a constitutionally permissible manner, it must have a significant aggregation of contacts, creating state interests, such that choice of law is neither arbitrary nor fundamentally unfair."[10] For example, if a statute or policy of the forum state is set up as a defense to a suit brought under the statute of another state, the conflict is resolved, not by giving automatic effect to the full faith and credit clause and compelling a court to subordinate its own statutes to those of others but by appraising the governmental interest of each jurisdiction and deciding accordingly.[11]

When Virginia imposed upon Texas' jurisdiction to adjudicate private claims, it must accord litigants equal standing as offered its own citizens. Virginia made itself sole adjudicator of HOW receivership claims. After forcing all parties to Virginia to assert claims, Virginia refused to recognize claims made under any other states' law. As such Virginia breached its agreement in ratifying Article IV, Section 1 of the U.S. Constitution.

In arbitrating Virginia's policy, there are two queries:

- **How does employing Texas law in an independent forum, interfere with administering the receivership?[12]**

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[10] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Insurance Co. v. Hague, 449 U.S. 302, 312-313 (1981) (plurality opinion)).

[11] Alaska Packers Assn. v. Comm. 294 U.S. 532 (1935); Bradford Elec. Co. v. Clapper, 286 U.S. 145 (1932).

[12] In Slotkin v. Brookdale Hospital Center, 357 F. Supp. 705, 707-8 (SD NY, 1972) despite an state injunction, the federal court refused to dismiss a fraud action against an insurer, explaining "this cause of action, to

- **Does Virginia's policy take precedence over non-residents' rights to have foreign law claims liquidated?**

Upon presentation of a claim, the Receiver has the same choice as the insurance company for whom it is legally substituted – pay the claim or defend it. Disruption is no more than caused by any claim against an insurance policy. Virginia's espousal of administrative proceedings as the most cost efficient mechanism is an admission of inherent limitations to such adjudication. Either an administrative forum provides the same minimal due process as a court, at comparable costs, or it disallows rights to private claimants. Agency adjudication may be less costly because they have a pool of expertise to draw upon, and are presumed to need less formal procedures. Whether a building has structural defects is not an expertise of the Commission. Their adjudicator must hear expert testimony, and employ the same truth finding procedures as law courts. This abrogates any cost savings. Whether Texas or Virginia law is employed makes no economic difference.

Virginia's mandatory policy is indefensible. One line of cases holds that where a receiver is appointed, the court taking jurisdiction draws unto itself exclusive control over liquidation of all claims. But the notion that such control is necessary for the protection of jurisdiction over the property is mistaken. As Justice Beach said, "The question is simply one of the admissibility and effect of evidence; and the obligation to receive a judgment in evidence is no more derogatory to jurisdiction in rem than the obligation to

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decide a claim against funds being administered by the state court, in no way interferes with the state's custody or control of the res."

receive in evidence a promissory note or other admissible evidence of debt."[13]

Distribution of a debtor's assets among creditors has a two fold aspect. It deals directly with the property when fixing the time and manner of distribution - no one can obtain part of the assets or enforce a right to specific property in the court's possession except on application. But proof and allowance of claims are distinct from distribution. They do not deal directly with any property. The latter function is a proceeding in personam. Establishing the existence and amount of a claim against the debtor in no way disturbs possession of the court, in no way affects title to the property, and does not necessarily involve the determination of what priority the claims should have. Chicago Title and T. Co. v. Fox Theaters Corp., 69 F.2d. 60 (2nd Cir, 1934).[14] Liquidation can be separated from administration as demonstrated in Gross v. Weingarten, 217 F.3d. 208, 223 (4th Cir, 2000), citing Morris v. Jones, 329 U.S. 545 (1947).

Virginia's interest is not keeping the res intact, but to fairly apportion the assets of the insolvent insurer in payment of its debts. Virginia has no interest in determining the Willy's claims except to insure it's done in a fair and legal manner. Providing an independent forum for liquidation does not interfere with the Commission's duty to equitably pay claims, or the independence accorded states in controlling insolvent insurers' affairs.

Full faith and credit and the comparable due process clause standards obligate the forum State to apply foreign law, subject only to a legitimate interest in furthering the forum's public policy. Allstate Insurance Co. v. Hague,

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[13] Beach, Judgment Claims in Receivership Proceedings, 30 Yale L. Journal 674, 680

[14] Riehle v. Margolies, 279 U.S. 218, 224 (1929) -

449 U.S. 302 (1981). In order "for a forum state's substantive law to be selected, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Insurance Co. v. Hague, 449 U.S. 302, 312-313 (1981). Most of HOW's contacts are with Texas -- not Virginia.[15] HOW only contact with Virginia is is its domicile.

If the Willy's claims made in a Virginia court, Virginia like every other state would employ its own procedural and insurance law, but the substantive law of the state where the cause arose.[16] Otherwise, nonresidents are without relief - they cannot claim under Virginia law because the wrong did not occur in Virginia. The Willy's tort and statutory claims are defined by Texas law. Buchanan v. John Doe, 246 Va. 67; 431 S.E.2d. 289 (1993) – Virginia law determines policy interpretation and procedural aspects, state of occurrence law determines tort law. McMillan v. McMillan, 219 Va. 1127; 253 S.E.2d. 662, 663 (1979); Jones v. R.S. Jones & Assoc, 246 Va. 3; 431 S.E.2d. 33 (1993). The law of the place of wrongdoing determines the

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[15] The property involved in this controversy is located in Texas, as were the builder, homeowners, lawyers, court of initial jurisdiction where HOW answered the Willy's claims, and almost all other contacts relevant to this case. The Deputy Receiver previously sued HOW in Texas. "According to the Deputy Receiver, he filed suit in Texas because at the time he took over the affairs of HOW Companies, their executive offices were located in Arlington, Virginia, but their operations center and most company employees were located in Dallas, Texas. In addition, all claims and underwriting functions for the HOW Companies were handled from the Dallas, Texas location, and the largest percentage of insured homeowners claims against the HOW Companies were located in Texas". Gross v. Spies, 1988 US App. LEXIS 471 (4th Cir, 1998).

[16] 4 AMJ Conflict of Laws, Domicile and Residence, §§ 3 and 26 (1990).

substantive law. This rule was not followed because of Virginia's policy that it uses only its own laws in this type of administrative adjudication.

United States Constitution, Article IV, Section 2 requires that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states", prohibiting preferences. It might be argued that by opening its administrative forum to Virginia law claims, Virginia has accorded the same privilege to foreigners as it does to its own citizens, but Virginia citizens have no reason to claim under Texas law. Requiring Texas citizens to claim in Virginia, and then precluding their claims because they must claim under Texas law is discriminatory. The right to sue and defend in court is one of the highest and most essential privileges of citizenship and must be allowed by each State to the citizens of all other States to the same extent that it is allowed to its own citizens. Chambers v. Baltimore & Ohio R.R., 207 U.S. 142, 148 (1907); McKnett v. St. Louis & S.F. Ry. Co., 292 U.S. 230, 233 (1934). A State may not give a preference to resident creditors in the administration of the property of an insolvent foreign corporation. Blake v. McClung, 172 U.S. 239, 248 (1898), nor refuse to open its adjudicative forums to foreign claims that satisfy the procedural requirements and normally would be heard.

Virginia's policy does not justify refusing to hear Texas fraud and deceptive trade practice claims after asserting full faith and credit to abate proceedings in a court of competent jurisdiction already hearing these claims. By doing so, Virginia failed to accord the privileges and immunities to which citizens are entitled under Article IV, Section 2.

Judicial Independence.

"Those who sit in administrative determination ... are likely to be conscientiously unconscious of what the lawyer

soon learns; namely, that there are two sides to most cases"[17] Due process requires an impartial and detached judge. Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972); In re Murchison, 349 U.S. 133, 136 (1955); Wong Yang Sung *v.* McGrath, 339 U.S. 33, 45-46 (1950). Although denominated as a "court" by Virginia, the Commission readily demonstrates it is neither unbiased nor judicially independent. Point after point demonstrates the Willy's case was determined by policy not rule of law.

Avoiding "conflicting rulings, piecemeal litigation of claims, and unequal treatment of policyholders" are goals, often traditionally "compromised" in our system by due process. The Commission avoids conflicting rulings and unequal treatment by denying all claims to which its employee objects. It avoids piecemeal litigation by requiring all claims be brought to its proprietary forum. This criticism embraces more than imprecise complaints of a coalesced judge, jury, and opposing party typically to agency adjudications:

- **Review of the decisions from the Commission's web page www.state.va.us/scc discloses no example of a successful HOW claim favorably disposed in disagreement with the Deputy Receiver.**

- **In its Report, the Commission agrees that HOW is independently responsible for major structural defects, but nonetheless it denied those claims – finding they had been previously asserted – although they admit that's legally impossible to have done so.**

- **It's as unfair to allow the Commission to finally liquidate claims, as it would be for an**

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[17] Joseph W. Henderson, *Lawyers Urge Judicial Curbs on Administrative Abuses*, 29 ABA Journal 681, 683 (1943)

insurance company to do so without a claimant's recourse to an independent court. Insurance companies have an economic interest in preserving assets by denying claims and forcing litigation; the Receiver has a statutory, political, and administrative interest in denying claims to preserve the res.

The Commission cannot provide a fair and unbiased hearing where it serves both as keeper of the res and adjudicator of claims. Commission hearings examiners, are at-will employees, subject to dismissal. They are exempt from Virginia Code, Title 2.2, Chapter 40 §2.2-4024(F) (ii.) – The Administrative Process Act - designed to guarantee independent and unbiased administrative adjudication. There are no Commission rules on hearing examiners' independence.

Although denominated as a "court", the Commission is not governed by Code of Virginia, Title 8.01 Civil Remedies and Procedure. It's Rules of Practice and Procedure adopted pursuant to Code of Virginia, Title 12.1, Chapter 5, §12.1-25 do not impose judicial constraints. The Commission exempts itself from Virginia's Freedom of Information statutes[18] thereby precluding public inquiry.

In other cases, Virginia has adopted the traditional view that administrative agencies adjudicating private claims are limited by de-novo court review. Bowman v. Virginia State Entomologist, 128 Va. 351; 105 S.E. 141 (1920) Fairfax Hosp. Ass'n v. Sines, 1503-87-4 (Ct. of Appeals, March 14, 1989) There is no similar rational applicable to Commission adjudications.

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[18] Gannon v. State Corporation Commission, 243 Va. 480; 416 S.E.2d. 446 (Virginia, 1992).

No safeguards insure that undue weight is not accorded to the Deputy Receiver's positions.[19] In National Home Insurance Company v. Commonwealth of Virginia, 248 Va. 161; 444 S.E.2d 711(1994), [20] Virginia's Supreme Court found the Commission not to be judicially independent[21] under the Federal Liability Risk Retention Act. The relationship between the Commission and its employees precluded its acting as an independent adjudicator. The same relationship exists here.

The Court establishing the receivership recognized de process problems. It provided in the receivership order:

> The Receiver ... shall have the power:
>
> (h) ... to defend suits in which any Respondent or the Receiver is a party in this

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[19] "The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law...At the same time, it preserves both the appearance and reality of fairness ... by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." Marshall v. Jerrico, 446 U.S. 238, 242 (1980); Schweiker v. McClure, 456 U.S. 188, 195 (1982).

[20] National Home Insurance Company v. Commonwealth of Virginia, 248 Va. 161; 444 S.E.2d 711(1994). For purposes of the Act only, the Commission, as a regulatory tribunal, is neither an "independent judicial officer" nor a court of competent jurisdiction as contemplated by Congress.

[21] (The) Commission delegates certain duties and responsibilities to the Commissioner of Insurance, who is also an employee of the Commission serves at its pleasure. Here, the Bureau of Insurance, a division of the Commission, sought the injunction. The hearing was conducted by the Commission, and its counsel participated ... Congress intended that there be an institutional separation between the state insurance commissioner and the decisional body considering the insurance commissioner's request for an injunction. National Home Insurance Company, supra.

> state or elsewhere, (*emphasis added*) whether or not such suits are pending as of the date of this order, to abandon the prosecution or defense of suits...

but the Commission expressly refused the Willy's request to have adjudication conducted in another forum.

In Re: Commonwealth of Virginia, ex rel. State Corporation Comm'n, et al. v. Home Warranty Corp., et al,[22] the Circuit Court of the City of Richmond reconsidered this receivership order. Unfortunately, the court was limited by Virginia Code, Title 38.2, Chapter 15, §38.2-1508 that "all further proceedings in connection with the rehabilitation and liquidation shall be conducted by the Commission without any control or supervision by the court to which the application was made". Nonetheless, the court noted due process concerns because the movants were not parties to the proceedings when the order was entered, but was salved because in that case the Commission allowed trial to be conducted in another forum.

It's fundamental to due process to provide an opportunity for appellate review that a forum speaks it's rational. Goldberg v. Kelly, 397 U.S. 254 (1970). Commission decisions are not reasoned legal conclusions applied to the facts. The Commission's April 22, 2003, Order (Appendix, Page 10) "rubber stamped" without discussion the findings and recommendations of the Hearing Examiner's February 10, 2003 Report (Appendix, Page 11, 32-33). The Commission never permitted an oral hearing. By simply concluding that the "Deputy Receiver has presented a more accurate analysis of the applicable law",

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22 Case No. HE-1059-1, Circuit Court of the City of Richmond, Virginia, 1996 Va. Cir. LEXIS 677 (1996).

the Hearing Examiner abrogated responsibility to determine legal issues.

Goldberg defined essential elements of due process in administrative hearings.[23] Due process requires that the decision maker's conclusion must rest solely on the law and evidence adduced at the hearing. Ohio Bell Tel. Co. v. PUC, 301 U.S. 292 (1937); United States v. Abilene & S. R. Co., 265 U.S. 274, 288-289 (1924). To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on. Wichita R. & Light Co. v. PUC, 260 U.S. 48, 57-59 (1922).

The hearing examiner heard no evidence; he could not rest his recommended decision on the evidence adduced at hearing. The degree of unfairness is aptly demonstrated because the Deputy Receiver as the party asserting defenses of res judicata or collateral estoppel has the burden of proving by a preponderance of the evidence that a claim is precluded by a prior judgment. Neff v. Commonwealth, 39 Va. App. 13, 569 S.E.2d 13 (2002). In order to prove that a claim or issue is precluded, "'the record of the prior action must be offered in evidence.'" Bernau v. Nealon, 219 Va. 1039; 1041; 254 S.E.2d 82, 84 (1979). The Deputy Receiver never introduced a record from any trial. Because the

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[23] The decision maker's conclusion ... must rest solely on the legal rules and evidence adduced at the hearing. Ohio Bell Tel. Co. v. PUC, 301 U.S. 292 (1937); United States v. Abilene & S. R. Co., 265 U.S. 274, 288-289 (1924). To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on. Wichita R. & Light Co. v. PUC, 260 U.S. 48, 57-59 (1922) An impartial decision maker is essential. In re Murchison, 349 U.S. 133 (1955); Wong Yang Sung v. McGrath, 339 U.S. 33, 45-46 (1950).

presumption favors denial of summary judgment, the hearing examiner should have over ruled the Deputy Receiver.

All these factors demonstrate such a departure from traditional procedures found in adjudication of similar private claims as to violate traditional concepts of due process. The Supreme Court of Virginia should be reversed.

X. Conclusion.

For the foregoing reasons, petitioners request a Writ of Certiorari be granted; this matter briefed and set for argument.

Respectfully submitted,

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Box 27554
Houston, TEXAS 77227-7554
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Facsimile: (713)667-1700
Email: flyfisherm@aol.com
Pro Se and Representing Petitioners

Dated: June 22, 2004

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday 26th March, 2004.

Donald Willy, et al.,
Appellants,

against

Record No. 031991
S.C.C. Case No. INS-2001-00263

State Corporation Commission, et al.,
Appellees.

Upon an appeal of right from an order entered by the State Corporation Commission.

Upon consideration of the record, briefs, and argument by the appellants, in proper person, and by counsel for the appellee, the Court is of the opinion that there is no error in the order appealed from.

The Commission did not violate the due process rights of the petitioners when it adopted the Hearing Examiner's Report without conducting a "factual hearing." No such hearing was necessary because there were no material facts in dispute. Further, the petitioners received adequate notice prior to every proceeding before the Hearing Examiner and the Commission and the petitioners had the opportunity to be heard and to submit evidence in each of those proceedings.

The Commission did not err in adopting the Hearing Examiner's finding that the petitioners decided not to pursue their claims for "major structural defect" coverage under the

homeowners' warranty insurance policy. Although the petitioners had claimed that ten alleged defects qualified as "major structural defects" under the terms of the policy, they sent the Hearing Examiner a letter in which they indicated that they would be unable to offer any evidence that these alleged defects were in fact "major structural defects." The petitioners thus waived those claims for "major structural defect" coverage.

The petitioners' remaining claims against the insurer are barred by the previous judgment of the Texas court. Because the petitioners originally brought their claims for the other 15 alleged defects within the first two years of coverage under the policy, these claims were subject to the policy's "Builder Default" coverage. Under "Builder Default" coverage, the liability of the insurer is contingent upon the liability of the builder resulting from the builder's failure to perform. Under the doctrine of collateral estoppel, because the Texas jury determined that the builder was not liable for these alleged defects, there can be no liability on the part of the insurer. See Angstadt v. Atl. Nut. Ins. Co., 249 Va. 444, 446-47, 457 S.E.2d 86, 87 (1995).

The procedure employed by the Commission to determine cases involving an insolvent insurer placed in receivership did not violate the petitioners' right of due process. Code § 38.2-1508 establishes a single regulatory scheme for the comprehensive and efficient resolution of claims brought against an insolvent insurer. Both Code § 38.2-1508 and the receivership order established the Commission as the single forum in which such claims could be asserted against the insurer. To permit the "independent liquidation of private claims by a jury or other tribunal," as the petitioners request, would defeat the statutory purpose of creating a single regulatory scheme for the resolution of such claims.

We have considered the petitioners' remaining arguments and have concluded that they are without merit.

Accordingly, for the above reasons, the judgment of the State Corporation Commission is affirmed. The appellants shall pay to the appellees thirty dollars damages.

This order shall be certified to the State Corporation Commission.

A Copy,

Teste:

Clerk

COMMONWEALTH OFVIRGINIA
STATE CORPORATION COMMISSION
AT RICHMOND, APRIL 22, 2003

PETITION OF
DONALD AND SUSAN WILLY
CASE NO. INS-2001-00263

For review of HOW Insurance Company, Home Warranty Corporation and Home Owners Warranty Corporation Deputy Receiver's Determination of Appeal

ORDER

On October 14, 1994, the Circuit Court of the City of Richmond, Virginia, entered an order appointing the State Corporation Commission ("Commission") the receiver ("Receivership Order") of the HOW Insurance Company ("HOWIC"), Home Warranty Corporation ("HWC"), and Home Owners Warranty Corporation ("HOW") [1] collectively, "HOW Companies" or "HOW"). The Receivership Order granted the Commission the authority to proceed with the rehabilitation or liquidation of the HOW Companies and established a receivership appeal procedure to govern appeals and challenges to decisions rendered by the receiver or the receiver's duly authorized representatives.

On September 20, 2001, Donald and Susan Willy ("Petitioners") filed a Petition for Review ("Petition") with the Commission contesting the Deputy Receiver's Determination of Appeal issued in Claim No. 3693858 on August 24, 2001, whereby the Deputy Receiver denied

[1] Commonwealth of Virginia, ex rel. State Corporation Commission, et al. v. Home Warrant Corporation, et al., Court File No. HE-1059-1, Final Order Appointing Receiver for Rehabilitation or Liquidation (Cir. Ct. of Richmond 1994).

Petitioners' claims for builder limited warranty and major structural defect coverage on Petitioners' residence located 51 Burwick Street, Sugarland, Texas 77479.

This matter comes now before the Commission based on an extended history. Petitioners' home was enrolled in the HOW Program in August 1990.[2] By letter dated May 4, 1992, Petitioners notified HOW that Perry Homes, Inc. ("Perry Homes" or "Builder") had failed to correct fifteen defects brought to the attention of the Builder.[3] On July 22, 1992, a non-binding arbitration hearing was held among Petitioners, Perry Homes, and HOW regarding the alleged defects, and the arbitrator ruled in favor of Perry Homes.[4] Petitioners then sued Perry homes and HOW in Texas District Court.[5] When HOW was placed in receivership, the United States District Court for the Eastern District of Virginia enjoined all actions against HOW. [6] Accordingly, the Texas court severed Petitioners' suit against Perry Homes from Petitioners' suit against HOW, and stayed the case against HOW.[7] On February 25, 1997, a jury trial in the Texas District Court found in favor of Perry Homes.[8] By letter dated May 17, 1999, Petitioners sought HOW coverage relative to the fifteen defects included in its 1992 complaint as well as ten additional defects.[9]

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[2] Petition at 1.

[3] Petition at Exhibit 3.

[4] Petition at 2.

[5] Donald J. Willy, et al. v. Perry Houston Interest, Inc., et al., Cause No 77,849 (240th Dist. Fort Bend County, Tex. 1992).

[6] Commonwealth of Virginia, ex rel. Steven T. Foster, Commissioner of Insurance, and State Corporation Commission v. HOW Insurance Company, A Risk Retention Group, Home Warranty Corporation, and Home Owners Warranty Corporation, Cause NO. 3:94CV742 (E.D. a. 1994).

[7] Petition at 2-3.

[8] Petition at Exhibit 20..

[9] Petition at Exhibit 9.

By Order dated October 9, 2001, the Commission docketed the case, assigned the matter to a Hearing Examiner, and directed the Deputy Receiver to file an Answer or other responsive pleading to the Petition on or before November 2, 2001.

On November 2, 2001, the Deputy Receiver, by counsel, filed a Motion to Dismiss and Answer to Petition for Review, and Memorandum in Support of Motion to Dismiss ("Motion"). The Deputy Receiver asserted therein, among other things, that: (i) Petitioners' claims are untimely by the express contractual provisions of the HOW Program; (ii) most of the defects alleged by Petitioners related to the HOW Program Builder's Limited Warranty, and since these defects were subject to an arbitration and state court proceedings between Petitioners and Perry Homes in which the Builder prevailed, Petitioners are not entitled to compensation; and (iii) Petitioners assertions are insufficient to support a claim for Major Structural Defect coverage under the HOW Program.

On December 26, 2001, Petitioners filed a response to the Motion. They contended therein, among other things, that the Deputy Receiver's Motion should be denied since it failed: (i) to demonstrate that the Commission lacks jurisdiction; (ii) to state that the Petition did not state a cause of action; or (iii) to state that the Petition is legally insufficient.

By Hearing Examiner Ruling dated February 6, 2002, the Deputy Receiver's Motion was granted in part. The Hearing Examiner found that HOW Program Builder's Liability coverage[10] limited HOW's exposure to the Builder's liability, and without a finding of Builder liability in the

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[10] Limited Warranty coverage commences on the date which the home is enrolled in the HOW Program. The Limited Warranty coverage terminates two(2) years after its commencement. HOW Insurance/Warranty Document, Exhibit J to the Deputy Receiver's Memorandum in Support of the Motion to Dismiss at 3.

arbitration and state court proceedings, there could be no Builder Default coverage. Consequently, the Hearing Examiner granted the Deputy Receiver's Motion to Dismiss relative to HOW's Builder Default coverage. Since Petitioners claimed defects that could have been covered under HOW's Major Structural Defect coverage, and there were factual disputes concerning those defects, the Motion was denied as to defects claimed under Major Structural Defect coverage.[11]

In a ruling by the Hearing Examiner dated February 20, 2002, based upon an agreement between the parties, the procedural schedule and hearing date was suspended, and the matter continued generally.

On April 4, 2002, Petitioners filed a Motion to Remand ("Remand Motion") requesting the Commission to order the Deputy Receiver to take the steps necessary to remand this matter to the 240th District Court of Fort Bend County, Texas, for a jury trial to determine liability and damages. In its Remand Motion, Petitioners claimed, among other things, that: (i) the Receiver's authority does not legally include a determination of liability or damages, since this is normally determined by a jury where the parties do not consent; (ii) a determination of these issues by the Receiver without jury trial is a denial of due process; and (iii) conflict of laws rules require this matter be determined by a Texas jury.

On May 3, 2002, the Deputy Receiver filed a Response in Opposition to Petitioners' Motion to Remand. The Deputy Receiver averred therein, among other things,

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[11] Major Structural Defect is the actual physical damage to any of the designated load-bearing portions of the home caused by the failure of such load-bearing portions which affects their load-bearing functions to the extent that the home becomes unsafe, unsanitary or otherwise unlivable. Coverage for Major Structural Defects is provided during years three though ten. HOW Insurance/Warranty Document, Exhibit J to the Deputy Receiver's Memorandum in Support of Motion ot Dismiss at 6 and 20.

that: (i) the Commission has exclusive *in rem* jurisdiction over the affairs and the estate of HOW as granted by the Receivership Order pursuant to Title 38.2, Chapter 15 of the Code of Virginia; (ii) the Receivership Order and the Permanent Injunction issued by the United State District Court for the Eastern District of Virginia are entitled to full faith and credit by the courts in the state of Texas; (iii) requiring Petitioners to pursue their claims with the Commission is not a violation of due process; and (iv) Virginia law controls the issues in this case.

On May 28, 2002, Petitioners filed their Reply to the Deputy Receiver's Opposition to Motion to Remand. They contended therein, among other things, that: (i) the Commission should remand the claim to another forum for a liquidation of liability in order to insure due process; and (ii) the Hearing Examiner's Ruling of February 6, 2002, fails to address the fraud and consumer protection claims and fails to correctly apply Texas or Virginia res judicata law. Additionally, Petitioners decided not to pursue a Major Structural Defect claim against HOW and requested a final determination of the Remand Motion.

After reviewing the pleadings submitted in the case and the applicable law, the Hearing Examiner issued his Report on February 10, 2003, in which the Hearing Examiner made the following findings and recommendations:

(1) HOW's liability under limited warranty coverage rests on the builder's liability resulting from the builder's failure to perform.

(2) Without a finding of builder liability or obligation, there can be no Builder Default coverage.

(3) Since the Texas jury found no liability as to Perry Homes, summary judgment should be granted in favor of the Deputy Receiver relative to the fifteen defects reported in May 1992.

(4) The ten additional defects first reported to

HOW by letter dated May 17, 1999, are untimely as to Limited Warranty coverage.

(5) However, the ten additional defects first reported to HOW by letter dated May 17, 1999, are timely as to Major Structural Defect coverage and whether or not they fall within such coverage is a disputed factual issue.

(6) Therefore, the Deputy Receiver's Motion to Dismiss was denied in regards to the ten defects reported in May 1999.

(7) Petitioners subsequently decided not to purse the Major Structural Defect claim against HOW and requested a final determination of their Motion to Remand.

(8) Section 38.2-1508 of the Code of Virginia establishes a single regulatory scheme for the comprehensive and efficient resolution of claims against an insolvent insurer.

(9) Section 38.2-1508 and the Receivership Order inaugurated the Commission as the single forum in which claims against HOW could be asserted.

(10) Petitioners' claim for HOW warranty coverage can be seen only as a claim against the assets now under the control and ownership of the Commission.

(11) Petitioners have failed to make their case for a trial by jury.

(12) Petitioners' Motion for Remand should be denied.

(13) The Commission should enter an order adopting the finding of the Hearing Examiner, affirming the Deputy Receiver's denial of Claim No. 3693858, and dismissing this case from the docket of active matters.

On February 28, 2003, Petitioners filed Comments and Exceptions to the Hearing Examiner Report. The Petitioners contended therein, among other things, that: (i) Major Structural Defects are NOW's responsibility; (ii) prior adjudications do not collaterally estop the HOW claims; (iii) conflict of law rules do not support the Hearing Examiner's

Ruling; and (iv) the Hearing Examiner's Ruling denied due process.

Upon consideration of the filings submitted, the Report of Hearing Examiner, and the Comments thereto, the Commission is of the opinion and so finds that the findings and recommendations of the Hearing Examiner should be adopted.

Accordingly, IT IS ORDERED THAT:

(1) Petitioners' Motion for Remand be, and the same is hereby, DENIED.

(2) Petitioners' Petition for Review be, and the same is hereby, DENIED.

(3) The Determination of Appeal in Claim No. 3693858 issued by the Deputy Receiver on August 24, 2001, be and the same is hereby, AFFIRMED.

(4) The case is dismissed, and the papers herein are passed to the file for ended causes.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to: Donald and Susan Willy, Post Office Box, 27554, Houston, Texas 77227-7554; Patrick H. Cantilo, Esquire, Special Deputy Receiver, HOW Insurance Company, In Receivership, P.O. Box 184, Austin, Texas 78767-0184; Susan E. Salch, Esquire, Cantilo & Bennett, L.L. P., 7501-C North Capital of Texas Highway, Austin, Texas 78731 and the Commission's Office of General Counsel and the Bureau of Insurance.

A True Copy teste

s/s Joel Peck
Clerk of the State
Corporation Commission

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

PETITION OF
DONALD AND SUSAN WILLY
CASE NO. INS-2001-00263

For review of HOW Insurance Company, Home Warranty Corporation and Home Owners Warranty Corporation Deputy Receiver's Determination of Appeal

REPORT OF ALEXANDER F. SKIRPAN, SR.,
HEARING EXAMINER

February 10, 2003

The Willys seek to have their claim against HOW remanded to a Texas District Court. Previously, the Willys sued the builder of their home and HOW in Texas District Court concerning a claim brought under their homeowners warranty policy. Because HOW filed for bankruptcy, the Texas court severed the Willys' claim against HOW from the claim against their builder and stayed the claim against HOW. The Texas jury found in favor of the Willys' builder. The Willys' now seek a jury trial in Texas on their claim against HOW.

HISTORY OF THE CASE

On September 20, 2001, Donald and Susan Willy ("Willys") filed a Petition with the State Corporation Commission ("Commission") contesting the Deputy Receiver's Determination of Appeal in Claim No. 3693858 denying the Willys claim for coverage under their homeowners warranty insurance policy. By order dated October 9, 2001, the Commission docketed the Petition,

assigned the matter to a Hearing Examiner, and directed the Deputy Receiver to file an Answer or other responsive pleading to the Petition on or before November 2, 2001.

On, November 2, 2001, the Deputy Receiver filed a Motion to Dismiss and Answer to Petition, and a Memorandum in Support of Motion to Dismiss. In his Motion to Dismiss, the Deputy Receiver argued that the Willys' claims are untimely by the express contractual provisions of the HOW Program. The Deputy Receiver further alleged that most of the defects alleged by the Willys relate to the HOW Program Builder's Limited Warranty. These defects were the subject of an arbitration and court case between the Willys and their builder, Perry Homes. Inc. ("Perry Homes"). Because Perry Homes prevailed in both the arbitration and court case. the Willys are not entitled to any payments under the HOW Program Builder's Limited Warranty. Finally, the Deputy Receiver asserted that the Willys' allegations are insufficient to support a claim for Major Structural Defects as defined by the HOW Program.

By Hearing Examiner's Ruling dated November 7, 2001, the Willys were given an opportunity to respond to the Deputy Receiver's Motion to Dismiss by November 27, 2001. By Hearing Examiner's Ruling dated November 16, 2001, the filing date for the Willys to respond was extended to December 27, 2001. On December 26, 2001, the Willys filed a response in which they contended that the Deputy Receiver's pleading should be denied as it failed to demonstrate that the Commission lacks jurisdiction; that the Petition fails to state a cause of action; or that it is legally insufficient.

A Hearing Examiners Ruling dated February 6. 2002, granted the Deputy Receiver's Motion to Dismiss in part. Specifically, because the language of the HOW Program Builder Default coverage limited HOW 's liability to the Builder's liability, without a finding of Builder liability, there could be no Builder Default coverage.

Therefore, this Examiner granted the Deputy Receivers Motion to Dismiss in regards to HOW's Building Default coverage. However, the Willy's also claimed defects that could have been covered under HOW's Major Structural Defect Coverage. Because factual issues were in dispute concerning those defects, the Deputy Receiver's Motion to Dismiss was denied as to defects the Willys claimed under HOW's Structural Defect Coverage.

In a Hearing Examiners Ruling dated February 20, 2002, based on an agreement of the parties, the procedural schedule for this case was suspended.

On April 4, 2002, the Willys filed a Motion to Remand in which they requested the Commission to order the Deputy Receiver to take whatever steps are necessary to remand this matter to the 240th District Court of Fort Bend County, Texas, for a jury trial to determine liability and damages. A Hearing Examiner's Ruling dated April 5, 2002, established April 18, 2002, as the date for the Deputy Receiver to file a response to the Motion to Remand, and April 29, 2002, as the date for the Willys to file a reply. On April 11, 2002, the Deputy Receiver filed a Motion for Extension of Time For Filing Response to Petitioners' Motion to Remand. A Hearing Examiner's Ruling dated April 11. 2002, granted the Deputy Receiver's motion and reset the filing dates for the Deputy Receiver's response and the Willys' reply to May 3, 2002, and May 13, 2002, respectively.

On May 3, 2002, the Deputy Receiver filed his Response in Opposition to Petitioners' Motion to Remand in which he argued, among other things, that the Commission has exclusive in rem jurisdiction over the affairs and estate of the HOW Companies. On May 10, 2002, the Willys filed a Motion for Extension of Time to Reply, asking for an extension to May 28, 2001 A Hearing Examiner's Ruling dated May 17, 2002, granted the Willys' motion.

On May 28, 2002, the Willys filed a Reply to the

Deputy Receiver's Opposition to Motion to Remand. Among other things in their reply, the Willys requested a hearing on the remaining claims from the Hearing Examiner's Ruling dated February 6, 2002. Nonetheless, the Willys sought to have a ruling by the Commission on its Motion to Remand, with the pending issues held in abeyance. In the alternative, the Willys requested a hearing.

A Hearing Examiner's Ruling dated July 10, 2002, set the matter for hearing on September 4, 2002, and advised the parties that the issues raised in the Willys' Motion for Remand would be addressed in the Hearing Examiner's Report to the Commission. On July 17, 2002, a telephonic prehearing conference was held among Donald Willy, the Deputy Receiver, and the Hearing Examiner. During the prehearing conference, it was agreed that the hearing scheduled for September 4, 2002, should be postponed to provide the Willys an opportunity to further investigate the condition of their home. A Hearing Examiner's Ruling dated July 31, 2002, canceled the hearing and suspended this matter until further ruling

On September 11, 2002. the Willys filed a letter in which they indicated that they would not be able to offer evidence that any of the claimed defects still at issue were in themselves major structural defects as defined by HOW. Thus, the Willys requested a final determination of this matter, without waiving any of their rights to appeal any prior rulings.

FACTUAL BACKGROUND

According to the Petition, the Willys' home at 51 Burwick, Sugarland, Texas, was enrolled in the HOW Program in August 1990.[1] In a letter dated May 4, 1992, the Willys notified HOW that Perry Homes had failed to correct

[1] Petition at 1.

fifteen defects discovered by the Willys and brought to the attention of Perry Homes.[2] These defects included:

1. The third floor of the residence will not withstand loads as represented;
2. The sub-flooring of the second and third floors is inadequate or was damaged prior to sale and not repaired;
3. There were no reinforcing rods in the concrete driveway or sidewalk;
4. The electrical outlets were not properly installed;
5. The air conditioning system was not properly installed or engineered;
6. The yard was not properly landscaped to provide proper drainage;
7. The trees on the property were not adequately protected during construction;
8. The appliances were not of reasonable quality for a house of the same or similar construction and quality;
9. The roof rafters were improperly installed;
10. The balusters were improperly installed;
11. The wiring in the attic was improperly installed and a serious safety hazard;
12, The kitchen door was improperly installed;
13. The sheet rock in the front left corner of the dining room was improperly installed;
14. The gutters on the roof were not installed for proper drainage; and
15. The roof, flashing and other exterior components were not properly installed to prevent leaks.[3]

On July 22, 1992, a non-binding arbitration hearing was held among the Willys, Perry Homes, and HOW regarding the alleged defects.[4] The arbitrator found in favor of Perry Homes, and the Willys sued Perry Homes and HOW

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[2] Petition Exhibit 3.
[3] *Id.*
[4] Petition at 2.

in Texas District Court.[5] After HOW filed for bankruptcy and the United States District Court for the Eastern District of Virginia enjoined all actions against HOW, the Texas court severed the Willys' suit against Perry Homes from the Willys' suit against HOW, and stayed the case against HOW.[6] On February 25, 1997, a jury found in favor of Perry Homes.[7] Specifically, Question No. 2 of the jury decision was as follows:

What sum of money, if paid now in cash, do you find as the reasonable cost of repairs necessary to cure any construction defects that PERRY HOMES failed to cure, if any?

INSTRUCTIONS

Do not include in your answer any amount of damages resulting from any of the following:

a. Donald J. Willy and J. Susan Willy's failure to take reasonable action to mitigate their damages, if any;
b. Donald J. Willy and J. Susan Willy's failure to maintain 51 Burwick, if any;
c. Normal wear, tear or deterioration, if any;
d. Normal shrinkage due to drying or settlement of construction components within the tolerance of building standards, if any;
e. The Pecan Tree in the front yard at 51 Burwick; or
f. Substitute or temporary housing.

Answer in dollars and cents, if any.

ANSWER $0.00[8]

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[5] *Id.*
[6] *Id.* at 2-3.
[7] Petition Exhibit 20.
[8] *Id.*

In a letter dated May 17, 1999, the Willys sought HOW coverage regarding their home at 51 Burwick. In this claim the Willys requested recovery of costs related to the fifteen specific complaints included in their letter dated May 4, 1992, and the recovery of costs related to ten additional complaints. These new complaints were as follows:

a. Painting in the family room;
b. Flooring in the kitchen/breakfast area;
c. Stain railing on the second floor;
d. Cracking and discolored stucco over the kitchen area;
e. Garage doors needing adjustment;
f. Front windows needing to be re-glazed;
g. Brick repair needed in the left front corner of the house;
h. Front door threshold not sealed;
i. Cabinets in kitchen improperly installed;
j. Soffit vents needed to be added for attic ventilation.[9]

The Deputy Receiver reviewed the Willys' claim, employing Parker Engineering to inspect and report on the condition of the Willys' home.[10] In a Notice of Claim Determination dated May 11, 2001, the Deputy Receiver rejected the Willys' claim.[11] On June 5, 2001, the Willys appealed the Notice of Claim Determination.[12] In a Determination of Appeal dated August 24, 2001, the Deputy Receiver denied the Willys' appeal.[13] On September 20, 2001, the Willys appealed the Deputy Receiver's Determination of Appeal to the Commission.

As described above, on November 2, 2001, the Deputy Receiver filed a Motion to Dismiss and Answer to Petition.

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[9] Petition Exhibit 9
[10] Petition at 3.
[11] *Id.*
[12] *Id.*
[13] *Id.*

In his Motion to Dismiss, the Deputy Receiver made four arguments. First, no Builder Default coverage was applicable to this claim because Perry Homes prevailed in both the arbitration and the jury trial.[14] Second, the ten new items submitted in 1997 were untimely pursuant to the express terms of the HOW Insurance/Warranty documents.[15] Third, any loss or damage to the third level floor system caused by the Willys overloading it specifically was excluded from the HOW Program Major Structural Defect Coverage.[16] Finally, the Willys' allegations were insufficient to support a claim for major structural defects.[17]

In response, the Willys maintained that their claims against HOW remain contested and were not resolved by prior adjudications.[18] The Willys asserted that the Texas jury determined only that Perry Homes had no financial liability to the Willys.[19] Furthermore, the Willys contended that the Texas jury did not determine whether or not Perry Homes caused defects in the Willys home or HOW's financial responsibility for any defects.[20] Finally, the Willys averred that HOW cannot rely on the Texas jury's decision to preclude a determination of HOW's liability in this case.[21] The Willys submitted that such a preclusion would violate Virginia law concerning the doctrine of collateral estoppel.[22]

In the Hearing Examiner's Ruling dated February 6, 2002. I found that based on the language of the HOW Program Builder Default coverage, HOW's liability rests on the Builder's liability resulting from the Builder's failure to perform under [the] Limited

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[14] Motion to Dismiss at 6.
[15] *Id.* at 7.
[16] *Id.*
[17] *Id.at 8.*
[18] Response to Motion to Dismiss at 2.
[19] *Id* at 4.
[20] *Id.*
[21] *Id.*at 4-9.
[22] *Id.*

Warranty) as determined in dispute settlement under the HOW Program." Therefore, I agreed with the Deputy Receiver's argument that without a finding of Builder liability or obligation, there can he no Builder Default coverage. Moreover, I disagreed with the Willys' attempt to limit the Texas jury's finding. As shown above, the jury determined that the reasonable cost of repairs necessary to cure any construction defects that Perry Homes failed to cure was $0.00. Consequently, because there was no allegation of a finding of Builder liability there can he no Builder Default coverage. Therefore, I found that summary judgment should he granted in favor of the Deputy Receiver in regards to the fifteen defects reported in May 1992.

Regarding the ten additional defects first reported in the letter dated May 17, 1999, in the Hearing Examiner's Ruling dated February 6, 2002, I found these defects untimely as to Limited Warranty coverage. However, the filing of the May 17, 1999, letter was timely for Major Structural Defect coverage. Whether any of the ten additional defects amounted to Major Structural Defects as defined in the HOW Warranty documents was a disputed factual issue: therefore, the Deputy Receiver's motion to dismiss was denied in regards to the additional ten defects reported in May 1999. As described above, the Willys subsequently decided not to pursue a Major Structural Defects claim against HOW and requested a final determination on their Motion for Remand.

DISCUSSION

In their Motion for Remand, the Willys attempted to cast the issue as whether the Receivers requirements to administer the estate [take] precedence

over the Willy[s'] right to a jury determination in a forum of their choice, and whether the Commonwealth of Virginia and its courts and administrative agencies can interfere with lawful process in the State of Texas.[23] The Willys questioned the Commission's authority to determine liability or damages where the parties do not consent. In this regard, the Willys contended that the Permanent Injunction entered by the United States District Court for the Eastern District of Virginia was not authorized by statute and its use by the Deputy Receiver in this case would deny the Willys their constitutional right to a jury trial and due process.[24] The Willys asserted that the District Court issued its injunction pursuant to 15 U.S.C. 3906.[25] The Willys maintained that this statute is limited only to the risk retention group selling insurance or operating and did not authorize an injunction against the Willys.[26] In addition, the Willys insisted their claim was a private, common, and statutory law claim that is normally entitled to a jury trial.[27] The Willys argued that they never consented to having their claim determined by the Commission, but have sought to have their case remanded for jury trial, or compromised and paid.[28]

Furthermore, the Willys pointed out that in the order appointing the Commission as Receiver, the Court provided the Receiver with the power "to defend suits in which any Respondent or the Receiver is a party in this state or elsewhere...."[29] Based on the

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[23] Motion to Remand at 1.
[24] *Id.* at 3-4
[25] *Id.* at 4.
[26] *Id.*
[27] *Id.* at 5.
[28] *Id.* at 6.
[29] *Id.* (emphasis added).

use of the word "elsewhere." the Willys argued the Receiver should be required to defend lawsuits brought in other jurisdictions to determine liability of HOW. Thus, the Willys questioned whether other states are required to give the Commission's rulings full faith and credit and whether its determinations are entitled to res judicata.[30]

In addition, the Willys asserted that a determination by the Receiver without a jury trial is a denial of due process.[31] The Willys insisted the claims they originally brought against HOW in the 240th District Court in Texas remain contested and should be interpreted and resolved under Texas law in a trial by jury.[32] The Willys argued denial of their right to a trial by jury constituted an improper interference with Texas by Virginia.[33] In addition, the Willys maintained that trial by jury is required for contested matters of "private right" in accordance with Granfinancera, SA v. Nordberg.[34]

Finally, the Willys claimed conflict of law rules require that this matter be determined by a Texas jury.[35] The property that is the subject of the dispute, witnesses, claimants, and attorneys for both sides are all located in Texas.[36] The Willys stated that the Commission is not expert in interpreting Texas law. Because its jurisdiction was obtained through an extraordinary breach of comity and an improper extension of federal power in aid of one state over another equally sovereign state, if the Commission asserts jurisdiction, the Willys warned that the

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[30] *Id.* at 8.
[31] *Id.* at 10.
[32] *Id.*
[33] *Id.*at 11.
[34] 492 U.S. 33 (1989).
[35] Motion to Remand at 12.
[36] *Id.*

Commission will be reversed on appeal, and ... will be subject to criticism for violating the constitutional rights of persons who have no business being before it."[37]

In his response, the Deputy Receiver made four arguments. First, the Deputy Receiver asserted that the Commission has exclusive in rem jurisdiction over the affairs and the estate of HOW. This jurisdiction was granted in the Receivership Order[38] pursuant to Title 32, Chapter 15 of the Virginia Code.[39] The Deputy Receiver described the case law supporting the principle of orderly resolution of creditors' claims against an insolvent insurance company by having all claims against such all insurers brought in a single forum.[40] According to the Deputy Receiver, courts in both the Commonwealth of Virginia and the State of Texas have followed this principle to ensure the orderly resolution of competing claims and to prevent piecemeal or duplicative litigation.[41]

Second, the Deputy Receiver claimed the Receivership Order and the Permanent Injunction are entitled to full faith and credit by the courts in the State of Texas.[42] In support, the Deputy Receiver pointed to Article IV, Section I of the United States Constitution which requires that a valid judgment from one state be enforced in other states, regardless of the laws or public policy of the other states, so long as the issuing court had jurisdiction over the subject matter or the relevant

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[37] *Id.* at 14.

[38] Commonwealth of Virginia, ex rel. State Corporation Commission v. Home Warranty Corporation, Final Order Appointing Receiver for Rehabilitation or Liquidation, Court File No. HE-1059-1, (Cir. Ct. of Richmond 1994)("Receivership Order").

[39] Response at 2.

[40] *Id.* at 6; *See Eden Fin. Group v. Fidelity Bankers Life Ins. Co.*, 778 F. Supp. 278, 282-83 (E.D. Va. 2992) ("*Eden*"); *Munich American Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir. 2998)("*Munich*").

[41] Response at 6.

[42] *Id.* at 7.

parties.[43] The Deputy Receiver contended that the Receivership Order entered in 1994 is such an order.[44] In addition, the Deputy Receiver maintained that state court injunctions against bringing or maintaining suits in other states that may interfere with the receivership process have been afforded full faith and credit by the United States Supreme Court and by states such as Texas.[45] Indeed, the Deputy Receiver pointed out that "the Texas court has already afforded the Receivership Order and the Permanent Injunction full faith and credit, with the full agreement of the [Willys]."[46] More specifically, the Agreed Order of Stay and Abatement, signed November 1, 1995, stated that "in view of the stay against all pending litigation contained in the [Receivership] Order ... and the Permanent Injunction .... and in view of the parties' agreement to this Order, it is hereby ORDERED that this cause of action is staved and abated."[47]

Third, the Deputy Receiver argued that requiring the Willys to pursue their claims in the Commission is not a violation of due process.[48] The Deputy Receiver insisted that the Willys claims have been heard and that the Willys have ignored: (i) the results of the Expedited Dispute Settlement ("EDS") hearing by the National Academy of Conciliators ("NAC") provided by the HOW Program, (ii) the verdict entered by a Texas jury in favor of the builder, and (iii) the partial summary judgment gamed on February 6, 2002.[49] Moreover, the Deputy Receiver maintained whether or not the Willys consented to jurisdiction in the Commission's

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[43] *Id.*; *See Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n,* 455 U.S. 691, 705, 716(1982) ("*Underwriters Nat'l*").

[44] Response at 7.

[45] *Id.; See Bard v Charles R. Myers Ins. Agency Inc.*, 839 S.W.2d 791 (Tex. 1992)(*Bard*").

[46] Response at 9 (emphasis in original).

[47] Response at 9-10, Exhibit E.

[48] *Id.* at 10.

[49] *Id.* at 10-11.

court of equity is relevant, as the Receivership Order granted the Commission exclusive jurisdiction and has already received full faith and credit in the Texas court.[50] Regarding the language of the Receivership Order, which grants the Receiver the power to defend suits "elsewhere," the Deputy Receiver argued that such language is not probative of whether the Willys have a right to a jury trial in Texas.[51] Instead, the Deputy Receiver explained that such power is necessary for the Receiver to take action, such as filing a Notice of Receivership and Stay of Litigation, as was done in this case.[52] The Deputy Receiver summarized this argument by stating both Virginia and Texas recognize the benefit of requiring that all the claims against an insolvent insurer's estate be adjudicated in the receivership proceeding to ensure the fair and consistent treatment of all claims.[53]

Finally, the Deputy Receiver argued that Virginia law controls the issues in this case.[54] The Deputy Receiver provided several citations to support the proposition that an action brought in Virginia must be litigated under Virginia law.[55] Insurance liquidation cases were highlighted in Jump v. Goldenhersh.[56]

Insurance liquidation cases do not follow the same conflict of laws doctrine which applies to contract and tort cases ... Most states have found it wise to [apply the substantive law of the state of incorporation and domicile, even if most of the events of the case happened elsewhere]

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[50] *Id.* at 11.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 12.
[54] *Id.*
[55] *Id.* at 12-16. See Zukowski v. Dunton, 650 F.2d 30 (4th Cir. 1981); Nelson v. Chesapeake & O.R. Co., 88 Va. 971 (1892); Willard v.Aetna Casualty & Sur., 213 Va. 481 (1973); National Car Advertising Co. v. Louisville & Nashville R. Co., 110 Va. 413 (1909); and General Elec. Co. v. Keyser, 275 S.E.2d 298 (W. Va. 1981).
[56] 474 F. Supp. 1306 (E.D. Mo. 1979).

because insurance companies have traditionally been state-regulated, rather than being subject to the Federal Bankruptcy Act (11 C.S.C. § 22), and state laws form a delicately balanced network designed to protect all creditors of an insurance company equally, regardless of the state of their residence.[57]

The Deputy Receiver provided several examples in where the Commission, in the context of other receivership cases. held that application of another state's law would defeat the intent of the Virginia General Assembly to consolidate litigation involving insolvent insurers in Virginia and to avoid the creation of unlawful preference among creditors of the same class that may reside in different states.[58]

In their Reply, the Willys cast the issue as not whether full faith and credit permits abatement of their claims in Texas, but rather whether the Commission should remand the claim to another forum for a liquidation of liability in order to insure due process.[59] In other words, the Willys seek a Texas trial by jury to determine the level of liability and then would ask the Commission to apportion the claim and to pay any sum due.[60] The Willys continued to dispute the Hearing Examiners Ruling of February 6, 2002, and contended that the Ruling fails to address the fraud and consumer protection claims and fails to correctly apply Texas or Virginia res judicata law.[61]

The Willys highlighted several factual aspects of their claims. The Willys asserted that at trial, the builder

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[57] *Id.* at 1313.

[58] Response at 14-15. *See, Petition of Thomas and Mary Porcella, Case No. INS-2001-00268 ("Porcella"); Petition of McKellar Development of La Jolla,* Case No. INS-1996-00026("*La Jolla*").

[59] Reply at 1.

[60] *Id.*

[61] *Id.* at 2.

claimed that it had provided the Willys a HOW insurance policy in substitution for the warranties normally given for new construction.[62] Under Texas law, a builder may substitute a homeowner's insurance policy for warranties, and the owner has to rely upon the policy for reimbursement.[63] Consequently, the Willys contended that a judgment against the builder in the Texas trial would have been reversed under Texas law.[64]

In addition to disputing the prior Ruling, the Willys listed four questions that must he addressed:

1. What legal theories constitute appropriate claims against the assets?
2. What law is to be applied to these claims?
3. What forum and procedure should adjudicate and liquidate liability?
4. How is any liability apportioned?[65]

The Willys argued "that 'claims' are not limited to policy claims, but may include those asserted under the law of Virginia or any other place where HOW did wrong."[66] Thus, the Willys maintained that the law of the place of wrongdoing determines tort and statutory claims.[67] The Willys admitted Virginia law governs the interpretation of the insurance contract and the procedure employed by Virginia forums.[68] However, the Willys insisted their tort claims are to be determined by the law of Texas.[69] Because under Virginia law fraud claims are torts, the

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[62] *Id.* at 5.
[63] *Id.* at 5-6.
[64] *Id.* at 6.
[65] *Id.* at 2.
[66] *Id.* at 4.
[67] *Id.*
[68] *Id.* at 7.
[69] *Id. See Buchanan v. John Doe,* 246 Va. 67 (1993)(Applying law of the state of the wrong to determine tort liability).

Willys contended Texas law determines the Willys' claim.[70]

The Willys distinguished the issues the Commission addressed in Porcella and La.Jolla.[71] The Willys stated involved the effect of Florida's statute of limitations on policy claim time limitations, which they classified as procedural.[72] The Willys described the issue in La Jolla as pertaining to the fundamental charge of the Commission to administer the estate.[73] Neither of these cases involved questions regarding the application of substantive law to determine liability.[74] The Willys contrasted the Deputy Receiver's public policy arguments concerning convenience and uniformity with their Constitutional rights, and concluded that "[a] state cannot refuse to open its adjudicative forums to foreign claims that normally would be heard."[75]

The Willys argued that a finding of builder non-liability does not preclude HOW liability under the insurance contract, fraud, or the Texas Deceptive Trade Practices Act.[76] First, the Willys asserted that in the Texas case, the jury could have found HOW liable without imposing liability on the builder.[77] Second, the Willys contended that the policy says nothing about the builder being liable as a condition to HOW's performance.[78] Third, the Willys pointed out that several courts, including those of Virginia and Texas,

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[70] Replay at 7; *See Forsyth v. Cessna Aircraft Co.*, 520 F.2d 608 (9th Cir. 1975).
[71] *Id.* at 8.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.* at 9-12
[76] *Id.* at 14.
[77] *Id.*
[78] *Id.* at 14-15.

have permitted actions against HOW without action against the builder.[79] Fourth, the Willys stated that the Texas verdict did not deny any right of subrogation.[80]

The Willys answered the Deputy Receiver's argument that Texas has already accorded full faith and credit to the Virginia injunction by asserting "had Texas known that Virginia would not employ Texas law to interpret Texas jury verdicts, or Texas fraud law, or Texas Deceptive Trade Practices Act, thereby affecting a preference of Virginia's citizens over those of Texas, it might well have justifiably refused full faith and credit."[81] Put simply, the Willys questioned whether Virginia provides an appropriate forum for hearing the Willys' claims or whether they should be remanded to another forum.[82] In this regard, the Willys pointed out that both the Hearing Examiner and the Deputy Receiver are employees of the Commission and thus there is a lack of independence and a lack of safeguards.[83] Moreover, the Commission cannot conduct a jury trial and has no expertise in Texas law.[84] nor has Virginia joined any interstate compact to authorize its agencies to determine Texas liability.[85] The Willys continued to rely on Granfinancera to support their right to a trial by jury in a matter of "private right" to recover money.[86] Furthermore, the Willys continued to assert the Receivership Order anticipated the remand of cases when it authorized the Receiver "[t]o defend suits in which any Respondent or the

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[79] *Id.* at 115; *See Cobert et al. v. Home OwnersWarranty Corporation,* 239 Va. 460(1990).
[80] Replay at 26.
[81] *Id.*
[82] *Id.* at 18.
[83] *Id.* at 20.
[84] *Id.*
[85] *Id.* at 21.
[86] *Id.* at 22.

Receiver is a party in this state or elsewhere...."[87] In summary the Willys argued:

> Because there is a viable alternative to hearing the case in Virginia, and because Virginia does not provide a jury trial, which the [Willys'] would otherwise be entitled, and because the Commission's judicial independence is subject to question as a result of the Deputy Receivers actions, and because the Deputy Receiver can show no harm from remand, liquidation of liability in another forum is strongly favored.

Based on the pleadings, I find that the Deputy Receiver has presented a more accurate analysis of the applicable law. Virginia Code § 382-1508 establishes a single regulatory scheme for the comprehensive and efficient resolution of claims against an insolvent insurer. Specifically, § 382-1508 states:

> Whenever the Commission is authorized to act as a receiver to rehabilitate or liquidate an insurer... it shall have all the power and authority of a court of record as provided in Article IX, Section 3 of the Constitution of Virginia. All further proceedings in connection with the rehabilitation or liquidation shall be conducted by the Commission.... The Commission shall be vested by law with the title to all of the property, contracts and rights of action of the insurer as of the date shown by the Receivership Order. ..

Moreover, § 38.2-1508 and the Receivership Order inaugurated the Commission as the single forum in which claims against HOW could be asserted. The Willys' claim

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[87] *Id.* at 23.

for HOW warranty coverage can be seen only as a claim against assets now under the control and ownership of the Commission. Nothing presented by the Willys provides any indication that their claim for warranty coverage or their claims related to the failure to provide warranty coverage fall outside of the claims encompassed by Virginia receivership law. Indeed, the Willys' insistence that the outcome is dependent upon the application of Texas law illustrates how application of the law of states other than Virginia would create conflicting rulings, piecemeal litigation of claims, and unequal treatment of policyholders.[88]

Of the various cases cited by the parties, Bard provides a good example of the breadth and purpose of insurance receivership laws. In Bard the Supreme Court of Texas granted full faith and credit to a Vermont receivership court's injunction and dismissed an insurance agent's counterclaim. This case began with the Vermont receiver of a Vermont domiciled insurance company filing an action in a Texas court to recover money owed the estate by a Texas insurance agent.[89] In response, the insurance agent filed a counterclaim alleging the insurance company's pre-receivership management had conspired with a competitor to prevent the agent from placing certain insurance risks with the insurance company.[90] The trial court rejected the Vermont receiver's argument that the counterclaim was bared by the Vermont receivership court's injunction.[91] A Texas jury returned a verdict in the amount of $28,000 for the Vermont receiver on his claim against the insurance agent.[92] The jury returned a verdict in the amount of $382.447.90 in compensatory damages, $50,500 in attorney's fees, and $1.2 million in punitive damages for the

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[88] *See Eden* at 282-83.
[89] *Bard* at 793.
[90] *Id.*
[91] *Id.* at 794.
[92] *Id.*

insurance agent on his counterclaim.[93] In reversing the trial court, the Supreme Court of Texas emphasized the importance of having all of an insolvent insurer's claims in a single forum.

> The court ... failed to recognize that the Vermont injunction served the same interest in judicial economy unique to this type of case by joining all of an insolvent insurer's claimants in a single receivership. Texas has recognized the importance of this interest in article 21.28, section 4(b) of the Insurance Code. This procedure assures the equal treatment of all policyholders, claimants and creditors in insurance company liquidations. In authorizing a receivership court to enter an injunction barring suits from being brought or maintained elsewhere, the Legislature recognized the benefit, if not the practical necessity, of requiring that all claims against the insolvent insurer's estate be adjudicated in the receivership proceedings to ensure the fair and consistent treatment of all claims.[94]

I disagree with the Willys' attempt to cast their claim as a tort or fraud claim and as a claim against HOW that is independent of the builder's liability. Under the HOW Program, the only coverage available during the first two years of enrollment was the HOW Program Builder Default coverage, which, as explained above, eliminates the possibility of HOW liability absent a finding of builder liability or obligation. Insurance coverage by HOW, independent of builder liability, applies only to problems first reported in years three through ten. Such coverage was unavailable to the Willys for the claims at issue in this case

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[93] *Id.*

[94] *Id.* at 796-97 (footnotes omitted, emphasis in the original).

because the problems were reported during the first two years of enrollment. Therefore, consistent with the interpretation of HOW coverage used for all claimants and policyholders, in an earlier Ruling I granted the Deputy Receiver's Motion to Dismiss concerning the Willys' warranty claims.

Moreover, the Willys have failed to make the case for a trial by jury. I find that the analysis followed in Granfinancera is not applicable to state insurance receivership cases. Nonetheless, even under the analysis in Granfinancera, a trial by jury in this case would not be warranted. The Willys acknowledged that Granfinancera applies its right to a jury trial to matters of "private right" as opposed to "public rights." "Public rights" are defined as suits between the government and others.[95] Because the Commission is vested by law with the title to all of the insurer's property, this matter would appear to concern a "public right" as defined by Granfinancera.

Therefore, based on the arguments presented and a review of the underlying case law, I find that the Willys' Motion for Remand should be denied.

Accordingly, I RECOMMEND that the Commission enter an order:

(1) ADOPTING my findings;

(2) AFFIRMING the Deputy Receiver's denial of Claim No. 3693858; and

(3) DISMISSING this case from the docket of active matters.

COMMENTS

Pursuant to the Commission's Rules of Practice and Procedure, specifically Rule 5 VAC 5-20-120 C, the parties may file comments or exceptions to my findings and recommendations. Such comments may note a party's objections to any of the rulings, findings of fact or recommendations, and may offer remarks or clarifications

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[95] *Granfinancera* at 68-69.

regarding those findings and recommendations. Any comments to my findings must be filed with the Clerk of the Commission in writing in an original and 15 copies within 21 days from the date hereof The mailing address to which any such filing must be sent is Document Control Center, Post Office Box 2118, Richmond, Virginia 23218. Any comments shall also include a certificate at the foot of the document certifying that copies have been mailed or delivered to all counsel of record.

Respectfully submitted,

/s/ Alexander F. Skirpan

Alexander F. Skirpan,
Hearing Examiner

Document Control Center is requested to mail a copy of this Report on February 10, 2003, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to: Donald and Susan Willy, P.O. Box 27554, Houston, TX 77227-7554; Patrick H. Cantilo, Esquire, Special Deputy Receiver, HOW Insurance Company, In Receivership, 7501-C North Capital of Texas Highway, Suite 200, Austin, TX 78731; and to Susan E. Salch, Esquire, Cantilo & Bennett, LLP, 7501-C North Capital of Texas Highway, Suite 200, Austin, TX 78731.